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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE MANUEL ESPINOZA et
al.,

Defendants and Appellants.

B283298

Los Angeles County
Super. Ct. No. TA136973

APPEALS from judgments of the Superior Court of Los Angeles County, Tammy Chung Ryu, Judge. Affirmed and remanded in part with directions.

R.J. Manuelian for Defendants and Appellants.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant Jose Manuel Espinoza of four counts of attempted willful, premeditated, and deliberate murder, and it found true several gang, great bodily injury, and firearm enhancements. The same jury convicted defendant Omar Alonzo Espinoza¹ of two counts of attempted willful, premeditated, and deliberate murder, and it found true a gang enhancement allegation as to each count. The court sentenced Jose to 120 years to life in prison, and it sentenced Omar to 30 years to life in prison. On appeal, defendants argue the court violated their state speedy trial rights and erroneously admitted evidence of prior bad acts and witness intimidation. In a supplemental brief, Jose argues we should remand the matter as to him for resentencing under Penal Code² section 12022.53, subdivision (h), as amended by Senate Bill No. 620 (S.B. 620). As to Jose, we remand the matter for resentencing. We affirm the judgments in all other respects.

PROCEDURAL BACKGROUND

On February 5, 2016, the People charged Jose and Omar in an amended information with four counts of attempted willful, deliberate, and premeditated murder (§§ 664/187, subd. (a)). As to each defendant, the People alleged the attempted murders were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(4)), as well as several firearm enhancements

¹ We refer to defendants individually by their first names because they share the same last name.

² All undesignated statutory references are to the Penal Code.

(§ 12022.53, subds. (b)–(e)). As to Jose, the People also alleged he personally inflicted great bodily injury on each of the four victims (§ 12022.7, subd. (a)).

In December 2016, defendants were tried by a jury. On December 20, 2016, the jury convicted Jose of four counts of attempted willful, deliberate, and premeditated murder and found true the gang enhancements for all counts. As to Jose, the jury also found true the great bodily injury enhancement and all three firearm enhancements for counts 1 through 3, and, for count 4, it found true the firearm enhancements alleged under section 12022.53, subdivisions (b) and (c). As to count 4, the jury found not true the great bodily injury enhancement and the firearm enhancement alleged under section 12022.53, subdivision (d).

The jury convicted Omar of attempted willful, premeditated, and deliberate murder as alleged in counts 1 and 2, but acquitted him of counts 3 and 4. As to counts 1 and 2, the jury found Omar committed the attempted murders for the benefit of a criminal street gang, but it found not true the firearm enhancements as to those counts.

In June 2017, the court sentenced Jose to a total term of 120 years to life in prison. The court calculated Jose’s sentence as follows: (1) 40 years to life for count 1, consisting of 15 years to life for the attempted murder charge plus 25 years to life for the firearm enhancement under section 12022.53, subdivision (d); (2) a consecutive term of 40 years to life for count 2, consisting of 15 years to life for the attempted murder charge plus 25 years to life for the firearm enhancement under section 12022.53, subdivision (d); (3) a consecutive term of 40 years to life for count 3, consisting of 15 years to life for the attempted murder charge

plus 25 years to life for the firearm enhancement under section 12022.53, subdivision (d); and (4) a concurrent term of 35 years to life for count 4, consisting of 15 years to life for the attempted murder charge plus 20 years to life for the firearm enhancement under section 12022.53, subdivision (c).³ The court sentenced Omar to a total term of 30 years to life in prison, consisting of two consecutive 15 years to life terms for counts 1 and 2.

Defendants timely appealed their convictions.

FACTUAL BACKGROUND

1. The Shooting

On March 14, 2015, Emanuel Soltera attended a birthday party at his mother's home in Compton for his daughter who was turning eight years old. Shortly before midnight, Soltera, who was a member of the Alondra 13 criminal street gang, and his brother-in-law, Eduardo Arambula, were standing in an alley near the home smoking marijuana.

While Soltera and Arambula were standing in the alley, two young men, later identified as Jose and Omar, approached them. One of the men asked Soltera and Arambula where they were from. Soltera and Arambula didn't respond and ran away from the two men. As Soltera and Arambula ran, Jose fired a gun at them.

Jose shot Soltera four times—once in the chest, twice in the left arm, and once in the buttocks, and he shot Arambula once in the back. Jose also shot Soltera's daughter and Arambula's six-year-old daughter, who were playing outside in a “jumper” house.

³ The court stayed imposition of the remaining firearm enhancements the jury found true.

All four victims received emergency medical treatment and survived their injuries.

A few days after the shooting, police interviewed Soltera at the hospital. Soltera identified Jose as the shooter. Soltera recognized Jose from prior encounters, and Soltera had learned Jose's name after Soltera's sister showed him Jose's Facebook profile following one of Soltera's and Jose's initial encounters. Arambula and Soltera also later identified Jose and Omar in six-pack photographic lineups.

About 10 months after the shooting, the police interviewed Adolfo Lopez, who lived near the home where the shooting took place. Lopez told the police that before he heard the gunshots near Soltera's mother's home, two young men knocked on his front door and asked to see his nephew, who was a former member of Alondra 13. Lopez told the men his nephew wasn't home. About 15 minutes later, Lopez heard gunshots in his neighborhood. Lopez identified Jose as one of the men who had knocked on his door, but he could not identify Omar.

2. Soltera's Prior Encounters with Defendants

In March 2014, Soltera was walking in front of his mother's house when Jose and another man approached him. Jose and the other man "diss[ed]" Alondra 13 and flashed gang signs associated with Compton Varrios 155th Street or CV 155. Soltera got into his car and followed the two men. When Soltera pulled up next to the men, Jose started shooting at him. Jose shot Soltera in the stomach and finger. Soltera drove back to his mother's house, passed out, and later woke up in the hospital. Soltera refused to tell the police how he had been shot because he didn't want to "snitch."

Around late November 2014, Jose and another man approached Soltera and Arambula at a liquor store and asked the two men where they were from. When Soltera and Arambula responded that they were from “nowhere,” Jose lifted his shirt and revealed a gun in his waistband.

Around early February 2015, Omar was riding in a car with other men. When he saw Soltera, Omar said “fuck Alondra” and threw up signs associated with CV 155.

3. Gang Evidence

Los Angeles County Sheriff’s Deputy Joseph Sumner testified as the People’s gang expert. CV 155 is one of the original Hispanic criminal street gangs in Compton. Alondra 13 is one of CV 155’s rival gangs. CV 155 has several symbols associated with it, including the number “five” and the phrase “CV 155,” both of which its members “tag” throughout Compton, as well as a hand gesture, where a member stretches out all five of his fingers and places his hand in front of his chest, with the palm facing toward the member’s body. The gang’s primary criminal activities include: petty theft, burglary, robbery, assault, assault with a firearm, narcotic sales, weapon sales, and murder.

The People introduced the certified conviction records for Rene Carmona and Antonio de Jesus Banda, two members of CV 155. In August 2014, Carmona was convicted of assault with a firearm, with gang and firearm enhancements. In June 2012, Banda was convicted of assault by means likely to produce great bodily injury.

Sumner opined that Omar is a member of CV 155, based on information he received from three other detectives, as well as his review of “[field identification] cards.” Sumner also viewed photographs from Omar’s phone that showed Omar flashing gang

signs and posing with other CV 155 members in front of a wall marked with CV 155 related graffiti. Omar's gang moniker is "Spanky." Sumner did not review any field identification cards for Jose, but he did review photographs that showed Jose had gang-related tattoos, such as the letter "S," styled like the Superman logo, on his chest and the number "13" on his lips. According to Sumner, the "S" represents the "5th," another name for CV 155, and the "13" stands for "M," the thirteenth letter of the alphabet and a symbol of the Mexican Mafia.

When asked a hypothetical question based on the facts of this case, Sumner opined that the two CV 155 members likely committed the crime for the benefit of the gang. According to Sumner, the crime would benefit CV 155 because it could have eliminated a member of a rival gang and boosted the reputation of CV 155.

4. Defense Evidence

Several members of defendants' family testified that defendants were inside their mother's home around the time of the shooting on March 14, 2015.

DISCUSSION

1. Speedy Trial Rights

Defendants contend the court violated their state speedy trial rights when it continued their case in April 2016 to allow Jose to obtain appointed counsel after his newly-retained counsel had to withdraw from the case. As we explain, defendants' speedy trial rights were not violated because the court had good cause to continue their trial.

1.1. Relevant Background

Defendants were first jointly charged by an information in September 2015. They were arraigned on the information on October 6, 2015. The People filed an amended information on February 5, 2016, and defendants were arraigned on the amended information that same day. Between early February and early April 2016, the court held several pretrial hearings at which defendants waived their statutory rights to a speedy trial.

On April 7, 2016, or day 0 of 30, Jose requested to substitute new private counsel for his attorney who had represented him in this case for nearly a year. The court was reluctant to allow Jose to substitute in new counsel, noting that defendants' case had "been lingering ... for over a year." The court asked Jose's proposed counsel whether he would be ready to proceed to trial within 30 days and expressed concern that defendants were attempting to delay the trial. After Jose's proposed counsel ensured he would be ready to proceed to trial within 30 days, the court granted Jose's request, allowed Jose's proposed counsel to substitute into the case, and relieved Jose's prior attorney from the case.

On April 13, 2016, the court relieved Jose's newly-appointed counsel due to a conflict of interest that counsel had revealed to the court in an in camera hearing. After Jose informed the court he could not afford to hire a new private attorney, the court addressed the parties: "That's where we are. I will appoint the public defender. We will put the case over. We will start from the beginning. You will waive time. You probably will not see a trial on this case for 2 months. Your brother Omar whether he likes it or not will have to agree with it or I'll find good cause to continue it over your objection Mr. Omar Espinoza.

You are not going anywhere. You will sit in jail and not have a speedy trial. We will have to hold the case. We will have to contact the public defender's office. They will have to run a records check to see if there is a conflict—actually we will have to call the bar panel. You will have to be here awhile until we find you a lawyer. We will do that sometime today. Everyone will have to stick around. Everyone meaning both defendants since they are not going anywhere.” The court continued the case and, later that same day, appointed a bar panel attorney to represent Jose. Defendants did not object to the continuance. Their trial began on December 5, 2016.

1.2. Applicable Law and Standard of Review

Article I, section 15, of the California Constitution guarantees a criminal defendant the right to a speedy trial. (*People v. Hajjaj* (2010) 50 Cal.4th 1184, 1193 (*Hajjaj*)). Section 1382 implements that right. (*Ibid.*) Under section 1382, a defendant must be brought to trial within 60 days of his arraignment on an information, unless he waives the 60-day period or the court finds good cause to continue the trial beyond that period. (*Id.* at p. 1194.) If the defendant is not brought to trial within the 60-day period and he either does not waive time or good cause for a continuance is not shown, the court must dismiss the action. (§ 1382, subd. (a); *Hajjaj, supra*, 50 Cal.4th at p. 1193.)

The court has broad discretion to determine whether good cause exists to continue the trial, and we will not disturb the court's finding of good cause unless there has been an abuse of discretion. (*Hajjaj, supra*, 50 Cal.4th at pp. 1197–1198.) “[A] number of factors are relevant to a determination of good cause: (1) the nature and strength of the justification for the delay, (2)

the duration of the delay, and (3) the prejudice to either the defendant or the prosecution that is likely to result from the delay. [Citations.]’ ” (*Id.* at p. 1197.) Good cause exists when the delay is caused by the defendant or occurs for the defendant’s benefit. (*Id.* at p. 1198.) It also exists when there has been an unexpected illness or unanticipated unavailability of counsel. (*Ibid.*)

In addition, when “two defendants are jointly charged in an information and the trial court continues the trial as to one of the defendants for good cause, section 1050.1 provides that the continuance of the trial as to that defendant constitutes good cause to continue the trial ‘a reasonable period of time’ as to the other defendant in order to permit the defendants to be tried jointly.”⁴ (*People v. Sutton* (2010) 48 Cal.4th 533, 558 (*Sutton*).) Although section 1050.1 states that a continuance may be granted “‘upon [the] motion of the prosecuting attorney,’ ” the statute “was not intended, and reasonably cannot be interpreted, to require an explicit motion by the prosecutor seeking such a continuance as a necessary prerequisite to a trial court’s finding

⁴ Section 1050.1 provides: “In any case in which two or more defendants are jointly charged in the same complaint, indictment, or information, and the court or magistrate, for good cause shown, continues the arraignment, preliminary hearing, or trial of one or more defendants, the continuance shall, upon motion of the prosecuting attorney, constitute good cause to continue the remaining defendants’ cases so as to maintain joinder. The court or magistrate shall not cause jointly charged cases to be severed due to the unavailability or unpreparedness of one or more defendants unless it appears to the court or magistrate that it will be impossible for all defendants to be available and prepared within a reasonable period of time.”

of good cause to continue a codefendant's trial in order to permit a joint trial." (*Id.* at p. 559.) Thus, the People need not move for a continuance before the court may continue the joint trial of multiple defendants under section 1050.1. (*Ibid.*)

A defendant can raise a speedy trial claim in two ways: through a pretrial petition for an extraordinary writ or through a direct appeal following his conviction. (See *Serna v. Superior Court* (1985) 40 Cal.3d 239, 263.) "Prejudice is presumed when relief is sought on section 1382 grounds pretrial because the statute commands that the court 'must order the action to be dismissed.'" (*Ibid.*) However, a defendant seeking post-conviction relief for a violation of his speedy trial right must demonstrate that he was prejudiced by the delay. (*People v. Lomax* (2010) 49 Cal.4th 530, 556–557.) In evaluating prejudice, we " " "weigh the effect of the delay in bringing [the] defendant to trial or the fairness of the subsequent trial itself." ' [Citation.]" (*Id.* at p. 557.)

1.3. Analysis

Here, the court had good cause to continue trial beyond section 1382's statutory period with respect to Jose. At the April 2016 hearing, the court allowed Jose's newly-retained counsel to withdraw from the case after finding counsel had a conflict of interest that prevented him from continuing to represent Jose. Because Jose could not afford new private counsel, the court needed to arrange for him to obtain appointed counsel, who would have been unfamiliar with Jose's case and likely would have needed time beyond section 1382's statutory period to prepare Jose's defense. The court therefore had good reason to continue Jose's case beyond the statutory period. (See *Hajjaj, supra*, 50 Cal.4th at p. 1198 ["Good cause within the meaning of section 1382 exists, for example, when ... there are unforeseen

circumstances such as ... unanticipated unavailability of counsel ...”].) Because the court had good cause to continue the trial as to Jose, it necessarily had good cause to continue the trial with respect to Omar under section 1050.1. (See *Sutton, supra*, 48 Cal.4th at p. 558 [the continuance of trial as to one jointly-charged defendant constitutes good cause to continue the trial for a reasonable time period as to the other defendant to facilitate the defendants being tried jointly].)

Defendants’ reliance on cases like *Sanchez v. Superior Court* (1982) 131 Cal.App.3d 884 (*Sanchez*) and *Arroyo v. Superior Court* (2004) 119 Cal.App.4th 460 to argue the statutory preference for joint trials cannot outweigh an incarcerated defendant’s statutory speedy trial rights is misplaced. The California Supreme Court in *Sutton* expressly overruled *Sanchez* and *Arroyo* to the extent those cases held the state’s interest in maintaining joint proceedings cannot outweigh a defendant’s state speedy trial rights. (*Sutton, supra*, 48 Cal.4th at p. 562 [“the decisions in *Sanchez* ... and *Arroyo* ... are disapproved to the extent they hold or suggest that the state interests served by a joint trial cannot constitute good cause under section 1382 to continue a codefendant’s trial beyond the presumptive statutory deadline.”].) The high court reaffirmed that “the substantial state interests served by a joint trial properly may support a finding of good cause to continue a codefendant’s trial beyond the presumptive statutory period set forth in section 1382.” (*Ibid.*)

We also reject defendants’ claim that section 1050.1 does not apply in this case because the People never moved to continue the case as to Omar pursuant to that statute or because the court never expressly referenced the statute when it found there was good cause to continue defendants’ trial at the April 2016

hearing. As the court in *Sutton* held, section 1050.1 does not require the prosecution to move for a continuance before the court may find good cause to continue a co-defendant's trial to maintain the joint trial of all defendants. (See *Sutton, supra*, 48 Cal.4th at p. 559.) Likewise, the court's authority to find good cause to continue a co-defendant's trial to maintain joint proceedings existed before the enactment of section 1050.1. (See *ibid.*) Accordingly, it is immaterial whether the court explicitly referenced section 1050.1 when it found there was good cause to continue Omar's case to facilitate a single trial for both defendants.

In sum, the court did not violate defendants' speedy trial rights because it had good cause to continue their trial beyond the statutory limit.⁵

2. Evidence of Prior Bad Acts

The identity of the shooters at the March 14, 2015 birthday party was one of the primary issues at trial. To prove the identities of defendants as the shooters, the People relied in part on evidence of the prior encounters between defendants and Soltera. Defendants contend the court erred in admitting evidence of these prior bad acts.⁶ We disagree.

⁵ In light of this conclusion, defendants cannot prevail on their claim that their trial attorneys were ineffective for failing to seek dismissal of their cases through a pretrial petition for an extraordinary writ. (See *Sykes v. Superior Court* (1973) 9 Cal.3d 83, 88–89 [dismissal following a pretrial petition for extraordinary writ relief is mandatory only if there is no showing of good cause to continue the defendant's trial].)

⁶ The People argue defendants forfeited this argument by not objecting at trial to the admission of the evidence of their prior encounters with Soltera. (See Evid. Code, § 353.) Anticipating the People's forfeiture

Generally, evidence of prior bad acts or uncharged criminal offenses is inadmissible to prove a defendant's conduct on a specific occasion. (See Evid. Code, § 1101, subd. (a); see also *People v. Cole* (2004) 33 Cal.4th 1158, 1194 (*Cole*).) However, such evidence may be used to prove other facts at issue, such as identity or intent. (Evid. Code, § 1101, subd. (b); *Cole, supra*, 33 Cal.4th at p. 1194.) “In cases in which the prosecution seeks to prove the defendant's identity as the perpetrator of the charged offense by evidence he had committed uncharged offenses, admissibility ‘depends upon proof that the charged and uncharged offenses share distinctive common marks sufficient to raise an inference of identity. [Citation.]’ [Citations.]” (*People v. Medina* (1995) 11 Cal.4th 694, 748.) “A modus operandi or criminal signature, creating an inference of identity, is demonstrated ‘“when the marks common to the charged and uncharged offenses, considered singly or in combination, logically operate to set the charged and uncharged offenses apart from other crimes of the same general variety.” ’ ” (*People v. Felix* (1993) 14 Cal.App.4th 997, 1005.)

Evidence of prior criminal acts must also be admissible under Evidence Code section 352. (*Cole, supra*, 33 Cal.4th at pp. 1194–1195.) Under that statute, “the probative value of the proffered evidence must not be substantially outweighed by the

argument, defendants argue their trial counsel rendered ineffective assistance by failing to object. We reject defendants' claim of ineffective assistance of counsel because, as we explain below, the court properly admitted the evidence of defendants' prior bad acts. (See *People v. Szadziwicz* (2008) 161 Cal.App.4th 823, 836 [“Counsel's failure to make a futile or unmeritorious motion or request is not ineffective assistance.”].)

probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (*Id.* at p. 1195.) “We review for abuse of discretion a trial court’s rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352.” (*Ibid.*)

Here, the court did not abuse its discretion when it admitted evidence of Soltera’s three prior uncharged encounters with defendants. With respect to the encounters involving Jose, both incidents involved the same victim and similar conduct by Jose to that giving rise to the underlying attempted murder charges. For example, during both the March 2014 and late November 2014 incidents, Jose and another person approached Soltera and made gang-related statements intended to intimidate Soltera. Both incidents also involved Jose brandishing or flashing a gun at Soltera. Additionally, the March 2014 incident occurred at the same location as the underlying shootings (Soltera’s mother’s home), and it involved Jose shooting Soltera after making gang-related statements. We are satisfied the circumstances surrounding the two prior incidents involving Jose were sufficiently similar to the March 2015 shooting to be admitted to establish Jose’s identity as one of the shooters.

The early February 2015 incident involving Omar also was sufficiently similar to the March 2015 shooting for purposes of establishing identity under Evidence Code section 1101. To be sure, there is nothing in the record that shows a gun was involved in the early February 2015 incident. But, like the underlying shooting, the February 2015 incident involved the same victim (Soltera) and similar conduct (a member of CV 155 trying to intimidate a member of a rival gang). Moreover, the February 2015 incident occurred close in time to, or a little more than a month before, the underlying shooting.

This case is distinguishable from *Williams v. Superior Court* (1984) 36 Cal.3d 441 (*Williams*), on which defendants rely to argue the court abused its discretion when it admitted evidence of defendants' prior encounters with Soltera. In *Williams*, the California Supreme Court held the trial erred when it refused to sever one of the defendant's murder charges from another set of charges, which included a second murder charge, against the defendant arising out of an incident that occurred almost one year after the incident giving rise to the first murder charge. (*Id.* at pp. 446–454.) Relevant to this case, the court held the evidence relating to the two sets of charges would not have been cross-admissible in separate trials as identity evidence under Evidence Code section 1101. (*Id.* at pp. 449–450.)

The evidence of the prior uncharged acts in this case, unlike the evidence related to the two sets of charges in *Williams*, shared more similarities than just their gang-related nature. Additionally, *Williams* was a capital case, in which “the joinder *itself* [gave] rise to the special circumstances allegation of multiple murder[s][.]” which required the court to “analyze the severance issue with a higher degree of scrutiny and care than is normally applied to a noncapital case.” (*Williams, supra*, 36 Cal.3d at p. 454.) Moreover, *Williams* was decided before section 186.22 was enacted. (See § 186.20 et seq., added by Stats. 1988, ch. 1242, § 1, eff. Sept. 26, 1988.) Consequently, the court in *Williams* did not consider whether evidence of the two sets of charges would have been cross-admissible for purposes of establishing a fact relevant to any gang enhancement that could have been alleged against the defendant in that case. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 655–656.)

We also conclude the court did not abuse its discretion in admitting the evidence of uncharged acts under Evidence Code section 352. Here, the gang-related nature of the prior uncharged

acts involving defendants is what makes them particularly relevant to the issue of identity in this case, since the underlying shootings were clearly motivated by the defendants' and Soltera's gang ties, just like the prior encounters. Thus, that defendants engaged in similar gang-related conduct toward the same victim during both the charged and uncharged encounters makes the evidence of the uncharged acts highly probative toward proving the identity of defendants as the shooters at the March 2015 birthday party.

3. Evidence of Witness Intimidation

Defendants next contend the court erred when it allowed Lopez to testify about a prior incident when a wall near his home was tagged with CV 155 related graffiti and his home was shot at shortly after he appeared at a court hearing in this case. Defendants also argue the court erred when it allowed the People to introduce evidence about the criminal activities of other CV 155 members. As we explain, the court properly admitted this evidence.

At trial, Lopez was reluctant to testify. He stated he was afraid to testify because he did not want anything to happen to his family. Lopez then explained that in August 2016, he had gone to court for a pretrial hearing in this case, but he ended up not having to testify at that hearing. When he returned home from court, he saw that someone had graffitied "155" or another symbol that appeared to be related to CV 155 on a wall next to his house. About 30 minutes after he and his nephew cleaned the graffiti off the wall, someone shot three or four bullets at his house, breaking some of his windows and piercing one of his walls.

One of the investigating officers testified that, prior to trial, Lopez had no difficulty recalling his interaction with Jose shortly before the March 2015 shooting. The People's gang expert later testified that it is a common practice of criminal street gangs to use fear or intimidation to dissuade witnesses from testifying at trials involving the gang's members.

"Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An explanation of the basis for the witness's fear is likewise relevant to [the witness's] credibility and is well within the discretion of the trial court." (*People v. Burgener* (2003) 29 Cal.4th 833, 869.) "It is not necessary to show threats against the witness were made by the defendant personally, or the witness's fear of retaliation is directly linked to the defendant for the evidence to be admissible." (*People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1588 (*Gutierrez*).)

In this case, the court properly admitted evidence showing Lopez was afraid to testify because he feared retaliation by members of CV 155 if he testified against defendants. As noted above, the identity of the March 2015 shooters was one of the primary issues at trial. The People called Lopez as a witness to help prove that Jose was one of the shooters based on Lopez's interactions with Jose shortly before the shooting. Thus, Lopez's credibility was a significant factor at trial, and the People were entitled to present evidence explaining why Lopez was reluctant or afraid to testify despite the fact that he had cooperated with investigators leading up to trial. That the People did not present evidence directly linking defendants to the gang-related activity that formed the basis for Lopez's fear is immaterial, since the

People were not required to make such a showing. (See *Gutierrez, supra*, 23 Cal.App.4th at p. 1588.)

The court also properly admitted evidence of Carmona's and Banda's prior convictions to establish CV 155's pattern of criminal activity. Generally, "where a gang enhancement is alleged, expert testimony concerning the culture, habits, and psychology of gangs is permissible because these subjects are 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' [Citations.]" (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506.)

Here, the People had alleged that defendants committed the underlying attempted murders for the benefit of a criminal street gang. It was therefore proper for the People to introduce evidence of crimes committed by other known members of CV 155 to establish that the gang constituted a criminal street gang for purposes of the gang enhancement. (See § 186.22, subd. (a)(1) [to prove gang enhancement, the People must prove, among other things, that the members of the defendant's gang "engage in, or have engaged in, a pattern of criminal gang activity"]; see also *People v. Duran* (2002) 97 Cal.App.4th 1448, 1457–1458 [to establish a "pattern of criminal gang activity," the People may introduce evidence of other gang members' prior convictions for enumerated offenses].) Any prejudicial effect of introducing such evidence was clearly outweighed by its probative value since the People spent little time introducing the evidence of Banda's and Carmona's convictions and did not focus on the factual bases for those convictions. (See Evid. Code, § 352.)

4. Cumulative Error

Finally, defendants argue the cumulative effect of the trial court's alleged errors and trial counsels' alleged deficiencies

requires reversal of their attempted murder convictions. “Under the cumulative error doctrine, the reviewing court must ‘review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence.’ [Citation.] When the cumulative effect of errors deprives the defendant of a fair trial and due process, reversal is required.” (*People v. Williams* (2009) 170 Cal.App.4th 587, 646.) Because defendants have not shown the court erred in any manner, there is no error to accumulate.

5. Jose’s Firearm Enhancements and S.B. 620

When it sentenced Jose, the court lacked discretion to strike or dismiss his firearm enhancements under section 12022.53. (See former § 12022.53, (h) [“Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section”], amended by Stats. 2017, ch. 682, § 2.) With the enactment of S.B. 620, however, sentencing courts now have discretion under section 12022.53, subdivision (h), to “strike or dismiss an enhancement otherwise required to be imposed by” those statutes if doing so would be “in the interest of justice pursuant to Section 1385.” (§ 12022.53, subd. (h).)

The parties agree that because S.B. 620 is “ameliorative legislation which vests trial courts with discretion, which they formerly did not have, to dismiss or strike a prior serious felony conviction for sentencing purposes[,]” it applies retroactively to all cases, including this one, which were not final when the legislation went into effect. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 972.) The parties disagree, however, about

whether Jose is entitled to a new sentencing hearing to allow the court to exercise its discretion to impose or to strike his sentencing enhancements. Relying on *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, the People argue remand is unnecessary because the record shows the court would not have struck or dismissed any of Jose's firearm enhancements even if it had the discretion to do so at the time of the original sentencing hearing.

Although the court imposed a substantial sentence with respect to Jose, the record does not clearly show the court would not have struck or dismissed Jose's firearm enhancements if it had the discretion to do so. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427–428.) Indeed, the court acknowledged the difficulty in having to impose such a substantial sentence on a young defendant, and it opted not to impose the maximum possible sentence on Jose by running the term on count 4 concurrently with the terms on counts 1, 2, and 3. We therefore remand the matter for resentencing to allow the court, in the first instance, to exercise its discretion to impose or to strike Jose's firearm enhancements. We offer no opinion on how the court should exercise that discretion.

DISPOSITION

As to Jose, the matter is remanded for the limited purpose of allowing the trial court to exercise its sentencing discretion under section 12022.53, subdivision (h), as amended by S.B. 620. We affirm the judgments in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, Acting P. J.

WE CONCUR:

DHANIDINA, J.

MURILLO, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.